# UNITED STATES DEPARTMENT OF JUSTICE
# EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
# OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

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| UNITED STATES OF AMERICA,<br>Complainant,<br><br>v.<br><br>PETCO, INC./BLUE FOUNTAIN DINER,<br>Respondent. | ) | 8 U.S.C. § 1324a Proceeding<br><br><br>OCAHO Case No. 95A00166<br><br><br>Judge Robert L. Barton, Jr. |

## ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION

**(March 14, 1997)**

## I. BACKGROUND

Complainant filed a six-count Complaint against Respondent on December 26, 1995. On November 6, 1996, Complainant filed a Motion to Amend the Complaint, along with an amended Complaint Regarding Unlawful Employment. In that first amended Complaint, Complainant corrected the spelling of several employees' names in Counts IV and VI, added allegations regarding one employee in Count IV, and withdrew allegations regarding one employee in Count VI.[1] Complainant filed a second Motion to Amend Complaint and a second amended Complaint Regarding Unlawful Employment on February 12, 1997. In the second amended Complaint, Complainant withdrew the allegations regarding one employee in Count II and two employees in Count VI. By Orders of November 19, 1996, and February 25, 1997, respectively, Complainant's Motions to Amend were granted. Unless otherwise indicated, any mention of the "Complaint" refers to the twice amended version.

In Count I of the Complaint, Complainant alleges that Respondent hired two employees for

[1] Although Complainant stated the intention of withdrawing the allegations regarding two employees from Count VI, C. First Mot. Amend Compl. at 1-2, only one of those employees was removed from the first amended Complaint. However, the allegations regarding the employee whose name mistakenly remained in the first amended Complaint were withdrawn successfully in the second amended Complaint.

employment in the United States after November 6, 1986, that those two employees were aliens not authorized for employment in the United States, and that Respondent hired those employees knowing that they were aliens not authorized to work in the United States, in violation of section 274A(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a(a)(1)(A). Compl. ¶¶ I.A-D. Alternatively, Complainant alleges that Respondent continued to employ the two individuals knowing that they were, or had become, unauthorized to work in the United States, in violation of section 274A(a)(2) of the INA, 8 U.S.C. § 1324A(a)(2), and 8 C.F.R. § 274a.3. Id. ¶ I.E. Complainant seeks a civil money penalty of $4,250.00 for each violation, for a total Count I penalty of $8,500.00.

In Count II of the Complaint, as amended, Complainant alleges that Respondent hired five employees for employment in the United States after November 6, 1986, and that Respondent failed to prepare the Employment Eligibility Verification Form (I-9 form) for those six employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Id. ¶¶ II.A-C. Alternatively, Complainant alleges that Respondent failed to present the I-9 forms for those five individuals at a scheduled inspection held on August 18, 1995, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Id. ¶¶ II.D-E. Complainant seeks a penalty of $820.00 per violation in Count II, for a total penalty of $4,100.00.

In Count III, Complainant alleges that Respondent hired three individuals for employment in the United States after November 6, 1986, and failed to ensure that those individuals properly completed section one of their respective I-9 forms, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Id. ¶¶ III.A-C. Complainant seeks a fine of $820.00 per violation in Count III, for a total penalty of $2,460.00

In Count IV, as amended, Complainant alleges that Respondent hired twenty-five employees for employment in the United States after November 6, 1986, and failed to properly complete section two of the I-9 form for those employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Id. ¶¶ IV.A-C. Complainant seeks a civil money penalty of $820.00 per violation in Count IV, for a total penalty of $20,500.00.

In Count V, Complainant alleges that Respondent hired four individuals for employment in the United States after November 6, 1986, that Respondent failed to ensure that those four employees properly completed section one of the I-9 form, and that Respondent failed to properly complete section two of the I-9 form for those employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Id. ¶¶ V.A-D. Complainant seeks a penalty of $820.00 per violation in Count V, for a total penalty of $3,280.00.

In Count VI, as amended, Complainant alleges that Respondent hired twenty-one individuals for employment in the United States after November 6, 1986, and failed to complete the I-9 forms for those employees within three business days of the date of hire for each of those employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Id. ¶¶ VI.A-C. Complainant seeks a fine of $820.00 per violation in Count VI, for a total penalty of $17,220.00. For

all six counts, Complainant seeks a total civil money penalty of $56,060.00.

In its Answer, filed February 26, 1996, Respondent admits the allegations of the Complaint regarding jurisdiction and the parties. With respect to Count I of the Complaint, Respondent admits that it hired the two named employees after November 6, 1986, but denies the remaining allegations of Count I, saying that the individuals presented identification and work eligibility documents and that it terminated those individuals after the Immigration and Naturalization Service (INS) gave information casting doubt on the authenticity of the documents presented. Ans. ¶¶ I.A-E.

With respect to Count II, Respondent admits that it hired the five named individuals for employment in the United States. Id. ¶ II.A. Respondent admits that it hired those individuals after November 6, 1986.[2] Id. ¶ II.B. Respondent denies that it failed to prepare I-9 forms for the five listed employees, id. ¶ II.C, but it admits that it failed to present I-9 forms for those employees at the scheduled INS inspection, stating that it could not find the I-9 forms for those people, id. ¶ II.E.

With respect to Counts III, IV and V, Respondent admits hiring the named individuals for employment in the United States after November 6, 1986. Id. ¶¶ III.A-B, IV.A-B, V.A-B. Respondent, however, denies that it failed to ensure that the employees properly completed section one of the I-9 form and/or that it failed to properly complete section two of the I-9 form. Id. ¶¶ III.C, IV.C, V.C-D. Respondent makes those denials on the grounds that there is a lack of specificity in the Complaint to allow Respondent to admit or deny those allegations. Id.

With respect to Count VI, Respondent admits that it hired the twenty-one named individuals for employment in the United States after November 6, 1986. Id. ¶¶ VI.A-B. Respondent denies that it failed to complete I-9 forms for those employees within three business days of hiring them on the grounds that the Complaint lacks specificity to allow Respondent to admit or to deny that allegation. Id. ¶ VI.C. Further, Respondent asserts that it believes the I-9 forms for the listed employees were prepared within the three business day time limit. Id.

Finally, in its Answer, Respondent asserts six affirmative defenses. First, Respondent contends that it did not know, and had no reason to believe, that the documents that were presented by the employees listed in Count I were not authentic. Id. ¶ A. Respondent also declares that it did not knowingly hire any workers unauthorized for employment in the United States. Id. ¶ B. Respondent argues that any paperwork violations "consist of inadvertent and innocent omissions." Id. ¶ C. Next, Respondent maintains that Complainant failed to treat different violations as having different levels of seriousness in setting the requested civil money penalty. Id. ¶ D. Respondent claims that the requested penalties are discriminatory and deny Respondent due process and equal treatment under the laws because the penalties sought differ from the standard Complainant uses in other comparable cases. Id. ¶ E. Further, Respondent alleges that the requested civil money penalties

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[2] Respondent denies hiring a sixth employee after November 6, 1986, Ans. ¶ II.B, but the paragraph regarding that person subsequently was dropped from the Complaint, see C. Second Mot. Amend Compl. at 1; Second Amended Compl. ¶ II.A.

for the allegations of paperwork violations "are harsh in the extreme and are confiscatory," considering "Respondent's good faith effort to comply with the law." Id. ¶ F.

Complainant filed its Motion for Partial Summary Decision and accompanying memorandum of law on December 23, 1996. The Motion requests summary decision as to liability with respect to Counts II, III, IV, V and VI of the Complaint. C. Mot. Partial S.D. ¶ 1. Complainant does not seek summary decision with respect to the civil money penalty. Id. ¶ 3.

Complainant contends that there are no genuine issues of fact regarding the issue of liability for Counts II-VI and that it is entitled to judgment as a matter of law. C. Mem. Supp. Mot. S.D. at 1. In its detailed supporting memorandum, Complainant addresses each alleged violation that is the subject of the present Motion for Partial Summary Decision. In support of the present Motion, Complainant attaches the following exhibits:

Exhibit A: I-9 forms for the employees listed in Counts III-VI of the Complaint.

Exhibit B: Respondent's Answer to the Complaint.

Exhibit C: Transcript of deposition of Nick Kostis (taken October 30, 1996).

Exhibit D: Complaint Regarding Unlawful Employment.

Exhibit E: Official record of receipt of ninety-four I-9 forms by INS from Respondent.

Exhibit F: Complainant's proposed version of Joint Stipulation of the Parties.

Exhibit G: Letter of October 28, 1996, from Respondent's counsel to Complainant's counsel regarding joint stipulations.

Exhibit H: Alphabetical list of employees (some of whose I-9 forms are the subject of the Complaint and some of whose forms are not), including date of hire, term of employment, and information summarizing the contents of each form. (Complainant refers to this exhibit as an "employee roster," but it actually is a document Complainant has generated. See infra pp. 19-20, 21.)

Exhibit I: INS Memorandum of Investigation, dated August 21, 1995, regarding the August 18, 1995, inspection of Respondent.

Finally, Complainant alleges that "Respondent's Answer to the Complaint set forth a general denial to the allegations regarding the actual failure of Respondent to properly comply with the employment eligibility verification system in Counts II-VI." C. Mem. Supp. Mot. S.D. at 29. Relying on the authority of Gulf Oil Corp. v. Bill's Farm Center, Inc., 52 F.R.D. 114 (W.D. Mo. 1970), aff'd, 449 F.2d 778 (8th Cir. 1971), and United States v. Long, 10 F.R.D. 443 (D.C. Neb. 1950),

Complainant notes that the Federal Rules of Civil Procedure rarely permit general denials of liability. Id. Complainant asserts that courts have held that mere denials or general allegations that "do not show the facts in detail" are insufficient to preclude summary judgment. Id. (quoting Engl v. Aetna Life Ins. Co., 139 F.2d 469, 473 (2d Cir. 1943) and also citing Duarte v. Bank of Haw., 287 F.2d 51, 53 (9th Cir.), cert. denied, 366 U.S. 972 (1961)).

Respondent filed its Answer to Complainant's Motion for Partial Summary Decision on January 28, 1997, and a supplement to that response on January 30, 1997. In Respondent's Answer to Complainant's Motion for Partial Summary Decision, Respondent admits many of the Complainant's allegations, but argues against summary decision with respect to certain points. Respondent's specific arguments will be noted and outlined later during the discussion of Complainant's Motion. In the supplemental response, Respondent admits the authenticity of Exhibits A, E and G attached to Complainant's Motion. R. Suppl. ¶¶ 1, 2, 4. Respondent notes that it never agreed to the contents of Exhibit F, which is a proposed stipulation of facts generated by Complainant. Id. ¶ 3. Respondent admits that the names included in Exhibit H "are the employees who are subjects of the Complaint," but it disputes the listed dates of hire in that exhibit. Id. ¶ 5. Finally, Respondent admits the authenticity of Exhibit I, while reserving the right to dispute or to confirm the contents of the testimony contained in that exhibit. Id. ¶ 6.

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 556(c), and the Rules of Practice and Procedure, 28 C.F.R. § 68.13 (1996), a prehearing conference was conducted by telephone in this case on Thursday, February 6, 1997. INS District Counsel Kent Frederick appeared for Complainant, and John Manos, Esq., represented Respondent. A court reporter was present in my office to record the conference, and a verbatim transcript of the conference has been prepared. The primary purpose of the conference was to consider Complainant's pending Motion for Partial Summary Decision. During the conference, I ordered Complainant to supplement its Motion, which it did on February 18, 1997. By Order of February 19, 1997, I required Respondent to submit a response to Complainant's supplement. Respondent filed that response on March 7, 1997.

## II. STANDARDS FOR SUMMARY DECISION

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996). Although the Office of the Chief Administrative Hearing Officer (OCAHO) has its own procedural rules for cases arising under its jurisdiction, the ALJs may find it helpful to look to analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rules governing OCAHO proceedings. The OCAHO rule in question is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before the federal district courts. As such, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. United States

v. Aid Maintenance Co., 6 OCAHO 893, at 3 (1996), 1996 WL 73594, at *3[3] (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Mackentire v. Ricoh Corp., 5 OCAHO 746, at 3 (1995), 1995 WL 367112, at *2 (Order Granting Respondent's Motion for Summary Decision) and Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992), 1992 WL 535567, at *5, aff'd, Alvarez v. OCAHO, 996 F.2d 310 (10th Cir. 1993) (table form; text available in 1993 WL 213912)); United States v. Tri Component Product Corp., 5 OCAHO 821, at 3 (1995), 1995 WL 813122, at *2 (Order Granting Complainant's Motion for Summary Decision) (citing same).

Only facts that will affect the outcome of the proceeding are deemed material. Aid Maintenance, 6 OCAHO 893, at 4, 1996 WL 735954, at *3 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)); Tri Component, 5 OCAHO 821, at 3, 1995 WL 813122, at *3 (citing same and United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994), 1994 WL 269753, at *2 (Order Granting Complainant's Second Motion for Summary Judgment)); United States v. Manos & Assocs., Inc., 1 OCAHO 130, at 878 (1989), 1989 WL 433857, at *2 (Order Granting in Part Complainant's Motion for Summary Decision). An issue of material fact must have a "real basis in the record" to be considered genuine. Tri Component, 5 OCAHO 821, at 3, 1995 WL 813122, at *3 (citing Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. (citing Matsushita, 475 U.S. at 587, and Primera, 4 OCAHO 615, at 2, 1994 WL 269753, at *2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. Id. at 4 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. United States v. Alvand, Inc., 1 OCAHO 296, at 1959 (1991), 1991 WL 717207, at *2 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *2 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." Alvand, 1 OCAHO 296, at 1959, 1991 WL 717207, at *2 (citing Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

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[3] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

28 C.F.R. § 68.38(b) (1996).

Under the Federal Rules of Civil Procedure, the court may consider any admissions on file as part of the basis for summary judgment. Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *3 (citing Fed. R. Civ. P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." Id. (citing Primera, 4 OCAHO 615, at 3, 1994 WL 269753, at *2 and United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991), 1991 WL 531744, at *3 (Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision)).

## III. FINDINGS AND CONCLUSIONS

Complainant is wrong in its assertion that Respondent makes a general denial in Counts II-VI of its Answer. Contrary to Complainant's claim, Respondent does not merely state in a general manner that it denies all the allegations in the Complaint; instead, Respondent replies to each allegation of the Complaint paragraph by paragraph, separately admitting or denying each allegation. Respondent's Answer cannot be deemed a general denial because Respondent actually admits certain allegations of Counts II-VI of the Complaint. See Ans. ¶¶ II.A-B, II.D-E, III.A-B, IV.A-B, V.A-B, VI.A-B. Of the twenty-three separately lettered paragraphs of all six counts of the Complaint, Respondent admits fourteen of them. In contrast, the defendant in one of the cases cited by Complainant denied every allegation of the complaint, except that the defendant admitted its particular corporate status and stated it lacked knowledge of the plaintiff's citizenship status. Arena v. Luckenbach S.S. Co., 279 F.2d 186, 188 (1st Cir.), cert. denied, 364 U.S. 895 (1960). Another case that Complainant cites also involves a true general denial: the defendant, in an answer composed of a single sentence, denied all the allegations of the complaint. United States v. Long, 10 F.R.D. 443, 444-45 (D. Neb. 1950). In the present case, Respondent, far from making a general denial by denying each and every allegation of the Complaint, actually admits more than half of the separately lettered paragraphs of the Complaint. Furthermore, Respondent provides particular details in response to certain allegations of Counts II-VI of the Complaint. See, e.g., Ans. ¶¶ II.B, II.E.

Complainant's argument that general allegations that do not set forth specific facts are insufficient to defeat summary decision, while true, was presented at an inappropriate point in the proceedings. As previously noted, a party may not rest upon only the allegations of its pleadings in opposition to a motion for summary decision after the moving party has met its burden. The cases Complainant cites support that proposition:

> But the fact is that appellants, when confronted with appellee's motion for summary judgment, did not by affidavit or argument make any representations as to how they planned to support the general allegation [contained in the answer]. Under these circumstances the rule is applicable that general allegations which do not give notice of the specific contention relied upon are insufficient to prevent the award of summary judgment.

(emphasis added) Duarte v. Bank of Haw., 287 F.2d 51, 53-54 (9th Cir.) (citing Piantadosi v. Loew's, Inc., 137 F.2d 534, 536 (9th Cir. 1943) and Engl v. Aetna Life Ins. Co., 139 F.2d 469, 473 (2d Cir. 1943)), cert. denied, 366 U.S. 972 (1961). Complainant, however, made that argument in its memorandum submitted in support of, and at the same time as, its motion for summary decision. As Complainant's own case demonstrates, Respondent was under no obligation to set forth specific facts in opposition to the Motion until the Motion had been made. Therefore, Complainant's argument, as presented in the context of asserting that Respondent's Answer did not set forth specific facts, was premature.

A. Affirmative Defenses

Respondent's first two affirmative defenses relate only to Count I and will not be discussed here as Count I is not the subject of the present Motion. As a third affirmative defense, Respondent asserts that any paperwork violations in its I-9 forms "consist of inadvertent and innocent omissions." Ans. ¶ C. In a prior OCAHO case, a respondent argued "that the omissions and failures to properly complete the Forms I-9 of [two employees] were inadvertent and unintentional." United States v. China Wok Restaurant, 4 OCAHO 608, at 15 (1994), 1994 WL 269371, at *11 (Decision and Order Granting in Part Complainant's Motion for Partial Summary Decision, Staying a Ruling on Count III, Directing Respondent to File Additional Evidence and Setting Date for an Evidentiary Hearing). Judge Schneider ruled that the "[r]espondent's argument is essentially a 'good faith' argument and is relevant to mitigation of the civil penalty, see 8 U.S.C. § 1324a(e)(5), but is not an affirmative defense to the allegations." Id. (citing United States v. Nevada Lifestyles, Inc., 3 OCAHO 463, at 22 (1992), 1992 WL 535620, at *15 (Order Denying Cross Motions for Summary Decision and Granting in Part Complainant's Motion to Strike Affirmative Defenses); United States v. Goldenfield Corp., 2 OCAHO 321, at 8 (1991), 1991 WL 531744, at *6 (Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision); and United States v. USA Cafe, 1 OCAHO 42, at 4 n.1 (1989), 1989 WL 433871, at *5 n.1 (Order Granting Complainant's Motion For Summary Decision)). Consequently, Respondent's third affirmative defense does not raise a genuine issue of material fact with respect to liability and, therefore, does not itself prevent an award of summary decision based solely on liability for paperwork violations.

Respondent's final three affirmative defenses relate only to the setting of the requested civil money penalty. Such affirmative defenses do not introduce a genuine issue of material fact with respect to liability. See United States v. Collins Foods Int'l, 1 OCAHO 67, at 434 (1989), 1989 WL 433894, at *3 (Decision and Order Granting Complainant's Motion for Partial Summary Decision) ("The inappropriateness of the fines . . . is essentially irrelevant for the purposes of determining actual liability under section 274A(a)(1)(B). Such a factor may, however, be considered in determining the amount of the fine pursuant to Section 274A(e)(5)"). If it is otherwise found that summary decision is appropriate, Respondent's arguments regarding the appropriate level of the civil money penalty do not prevent an award of summary decision regarding liability in this case.

B. Count I

Respondent argues for one-and-a-half pages that genuine issues of material fact exist in

relation to the allegations of Count I. R. Ans. C. Mot. Partial S.D. at 1-3. Complainant, however, has not sought summary decision with respect to those allegations.

C. Count II

Count II asserts that Respondent failed to prepare, or present for inspection, I-9 forms for five employees. An employer must prepare an I-9 form for each employee hired after November 6, 1986, see 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1) (1994); 8 C.F.R. §§ 274a.2(a), (b)(1)(i), (b)(1)(ii) (1996), and present any such I-9 forms at INS inspections, see 8 U.S.C. §§ 1324a(a)(1)(B), (b)(3) (1994); 8 C.F.R. § 274a.2(b)(2)(ii) (1996). Respondent admits that it did not present the I-9 forms for the individuals at the scheduled INS inspection because it could not find those forms. Ans. ¶ II.E; Kostis Dep. Tr. at 52; see also R. Ans. C. Mot. Partial S.D. at 3. Mr. Kostis, owner of the Respondent business, stated during his deposition of October 30, 1996, that the I-9 form for employee Michelle Scott[4] (¶ II.A.5) later was found and presented to the INS. However, "[a]t the time of inspection, Forms I-9 must be made available . . . at the location where the request for production was made." 8 C.F.R. § 274a.2(b)(2)(ii) (1996) (emphasis added). Also, "[a]ny refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in section 274A(b) (3) of the [Immigration and Nationality] Act." Id. (emphasis added); see also United States v. Big Bear Market, 1 OCAHO 48, at 312, 1989 WL 433851, at *23 (noting that a respondent's presentation of I-9 forms after the date of inspection "does not relieve it from liability for failure to be in compliance on the date of the inspection"), aff'd by CAHO, 1 OCAHO 55 (1989), 1989 WL 433848, aff'd on other grounds, Big Bear Market No. 3 v. INS, 913 F.2d 754 (9th Cir. 1990).

Although Respondent admits that it failed to present the I-9 forms at the scheduled inspection, it denies that it failed to prepare those forms. Ans. ¶ II.C; R. Ans. C. Mot. Partial S.D. at 3. In the present Motion, Complainant only argues for summary decision based on the alternative allegation of failure to present I-9 forms. C. Mem. Supp. Mot. S.D. at 8-9. Consequently, there are no disputed facts regarding Count II's allegation of failure to present I-9 forms at the scheduled inspection. Therefore, I grant Complainant's Motion with respect to the alternative charge of failure to present I-9 forms.

D. Count III

In Count III, Complainant alleges that Respondent hired three individuals and failed to ensure that they completed section one of their respective I-9 forms. An employer must ensure that its employees properly complete section one of their respective I-9 forms. See 8 U.S.C. §§ 1324a(a)(1)(B), (b)(2) (1994); 8 C.F.R. § 274a.2(b)(1)(i)(A) (1996). An examination of the I-9 forms for the employees listed in Count III reveals the following:

| Paragraph of Count III and Name | Omission in Section One |
|---|---|

[4] This employee's last name is given as "Scrot" at page 52 of the deposition transcript.

| | | |
|---|---|---|
| ¶A-1. | Anne Andrews | No date of employee signature |
| ¶A-2. | Lori Case | No employee signature |
| ¶A-3. | Andreas Minas Kostis | No date of employee signature |

Respondent contends that omissions in section one of the I-9 form are not the employer's responsibility. Regarding the I-9 forms for Anne Andrews and Andreas Minas Kostis, Respondent states that "[t]he lack of a date in Part I should not be chargeable to employer, who might not have authority to fill in any part of Part 1, including the date." R. Ans. C. Mot. Partial S.D. at 4. Referring to Lori Case's I-9 form, Respondent asserts that "[t]he employer's certification in Part 2 of this I-9 does not certify that Part 1 was signed in employer's presence. The employer could not, obviously, sign the employee's name. Therefore the lack of employee's signature on Part 1 should not be chargeable to employer." Id. Respondent's arguments show that it misunderstands the nature of the allegation. Although Respondent is correct in noting that it could not fill out portions of section one for the employee, the employer must "ensure" that each employee properly completes section one of the I-9 form. 8 C.F.R. § 274a.2(b)(1)(i)(A) (1996) (emphasis added).

OCAHO case law also advances the point that the employer bears ultimate responsibility for omissions in section one of the I-9 form:

> [W]hile it is clear that the employee actually fills out section 1, it cannot be doubted that the employer is ultimately legally responsible and accountable for the completion and integrity of the form. This legal responsibility is borne out by section 1324a(a)(1)(B) which requires that an employer can only hire individuals after "complying with the requirements of subsection (b)." Seen in its totality, subsection (b) includes employer and employee attestations as well as retention of verification forms. See, section 1324a(b)(1), (2), (3). Thus, the employer is clearly responsible for "complying" with the statutory requirement that an employee "attest" to his or her eligibility to work in the United States.

(emphasis added) United States v. Boo Bears Den, 1 OCAHO 71, at 451 (1989), 1989 WL 433832, at *2 (Order Granting Complainant's Motion for Summary Decision). That case specifically found employer liability for failing to ensure that the employee signed section one of the I-9 form. Id. Another OCAHO case found employer liability for failing to ensure that employees inserted the date of completion of section one, among other omissions. In United States v. Mario Saikhon, Inc., 1 OCAHO 279 (1990), 1990 WL 512080 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision), the complainant "contend[ed] in its motion [for summary decision] that the relevant signatures and dates [were] omitted from Section 1 and/or Section 2 of each Form I-9." Mario Saikhon, 1 OCAHO 279, at 1815-16, 1990 WL 512080, at *4. Judge Frosburg notes that the respondent's answer admitted "the omission of these crucial signatures and dates from either Section 1 or Section 2 of the Forms I-9" for the relevant 460 counts. Id. at 1816, 1990 WL 512080, at *5. For eight of those 460 I-9 forms listed in individual counts, the respondent also admitted the omission of other "relevant employee identification information," including date of birth, social security number and address. Id. "Based upon these admissions,"

Judge Frosburg concluded "that Respondent did not complete the Forms I-9 in question as required by IRCA."[5] Id. The Judge found liability with respect to those counts and granted the complainant's motion for summary decision regarding those counts after deciding that the respondent's asserted affirmative defenses[6] did not preclude summary decision for the complainant. See id. at 1823, 1990 WL 512080, at *10-11.

Evidence on the face of the I-9 form that necessary elements are missing in section one demonstrates that Respondent has failed in its duty to make sure that the employee properly completed section one. As there are no genuine issues of material fact in relation to Count III, and as Complainant is entitled to judgment as a matter of law, I grant Complainant's Motion for this count.

E. Count IV

In Count IV, Complainant alleges that Respondent failed to complete section two of the I-9 form for twenty-five employees. An employer must properly complete section two of the I-9 form. See 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1) (1994); 8 C.F.R. § 274a.2(b)(1)(ii)(B) (1996). An examination of the I-9 forms for the employees listed in Count IV reveals the following:

| Paragraph of Count IV and Name | Omission in Section Two |
|---|---|
| ¶A-1. Mary Boeggeman | No documents referenced[7] in List A or in Lists B and C, and no document information.[8] |
| ¶A-2. Michelle Borchardt | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-3. Joyce Clark | No document reference in List A, and no document |

[5] IRCA, or the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), amended the INA.

[6] The respondent in Mario Saikhon argued with respect to the relevant I-9 forms that service of the notice of intent to fine was inadequate and that it had substantially complied with the requirement of completing I-9 forms by photocopying employees' identification and work eligibility documents. See Mario Saikhon, 1 OCAHO 279, at 1818-19,1821-22, 1990 WL 512080, at *6-7, 9-10.

[7] The term "reference," as used throughout this list and the list of omissions for the Count V I-9 forms, means that section two of the I-9 form references a document, either by checking the appropriate box or by listing the document.

[8] The phrase "document information," as used throughout this list and the list of omissions for the Count V I-9 forms, refers to document identification numbers and expiration dates.

| | |
|---|---|
| | information; no document reference in List B, and no document information; birth certificate box checked in List C, but no document information. |
| ¶A-4. Catherine Deems | No document reference in List A, and no document information; no document reference in List B, and no document information. |
| ¶A-5. Monica Faison | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-6. Ulrich Haller | No document reference in List A, and no document information; no document reference in List C, and no document information. |
| ¶A-7. Vanessa Heath | No document reference in List A, and no document information; no document referenced in List B, and no document information. |
| ¶A-8. Yvonne Heinrich | No document reference in List A, and no document information; no document reference in List C, and no document information. |
| ¶A-9. Jennifer Horn | No document reference in List A, and no document information; no document reference in List B, and no document information. |
| ¶A-10. Susan Kasner | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-11. Michele Kovacs | No documents referenced in List A or in Lists B and C, and no document information. |

| | |
|---|---|
| ¶A-12. Bianca Mayer | No document reference in List A, and no document information; no document reference in List B, and no document information. |
| ¶A-13. Scott Minter | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-14. Anne Neishloss | No document reference in List A, and no document information; no document reference in List C, and no document information. |
| ¶A-15. Carole Piscitelli | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-16. Karen Rusnock | No document reference in List A, and no document information; no document reference in List B, and no document information. |
| ¶A-17. Veronica Schaefer | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-18. Joanne Simone | No document reference in List C, and no document information; driver's license improperly noted in List A, rather than in List B. |
| ¶A-19. Patricia Skrot | No document reference in List A, and no document information; no document reference in List C, and no document information. |
| ¶A-20. Dalia Soll | No document reference in List A, and no document information (document information for a driver's license is crossed out here); no document reference in List C, and no document information. |
| ¶A-21. Sharon Toms | No document reference in List A, and no document information; no document reference in List C, and no document information. |
| ¶A-22. Melanie Tur | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-23. William Tursi | No document reference in List A, and no document information; no document reference in List B, and no document information. |

| | |
|---|---|
| ¶A-24. Janice Winn | No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A25. Doreen Youkanavitch | No document reference in List A, and no document information; no document reference in List C, and no document information. |

An employer must verify an employee's identity and employment eligibility by examining and recording information in section two about a List A document[9] or by examining and recording information in section two about both a List B document[10] and a List C document.[11] See 8 U.S.C. § 1324a(b)(1)(A) (1994); 8 C.F.R. § 274a.2(b)(1)(v) (1996). Respondent admits that the documentation portion of section two lacks essential document references and information for the following forms: Mary Boeggeman (¶ IV.A.1), Michelle Borchardt (¶ IV.A.2), Joyce Clark (¶ IV.A.3), Catherine Deems (¶ IV.A.4), Monica Faison (¶ IV.A.5), Vanessa Heath (¶ IV.A.7), Jennifer Horn (¶ IV.A.9), Susan Kasner (¶ IV.A.10), Michele Kovacs (¶ IV.A.11), Bianca Mayer (¶ IV.A.12), Scott Minter (¶ IV.A.13), Carole Piscitelli (¶ IV.A.15), Karen Rusnock (¶ IV.A.16), Veronica Schaefer (¶ IV.A.17), Melanie Tur (¶ IV.A.22), William Tursi (¶ IV.A.23) and Janice Winn (¶ IV.A.24). See R. Ans. C. Mot. Partial S.D. at 10-17; Kostis Dep. Tr. at 55-60. As there are no genuine issues of material fact with respect to those forms, Complainant is granted summary decision for the paragraphs of Count IV that relate to them.

With respect to the remaining I-9 forms that are the subject of Count IV, Respondent admits that List C in section two of each of those forms is blank. See R. Ans. C. Mot. Partial S.D. at 4; Kostis Dep. Tr. at 57-61. "Respondent contends that the social security number is inserted in Part 1 in each case; that the number so inserted, and certified to below by the employer's signature, is proof that the employer had seen the social security card, and that thus, the technical requirement of the law has been complied with." R. Ans. C. Mot. Partial S.D. at 4-5. Respondent cites no authority for that proposition. At least one OCAHO case contemplates, in dicta, that the inclusion of information in section two of an I-9 form might excuse the failure to include duplicative information in section one. In United States v. PPJV, Inc., 2 OCAHO 354 (1991), 1991 WL 531865 (Order Denying Renewed Motion for Summary Decision), the INS charged as a violation the failure to include three employees' alien registration numbers in section one after the employees had checked the box indicating they were resident aliens. PPJV, 2 OCAHO 354, at 1, 1991 WL 531865, at *1.

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[9] List A documents establish both identity and employment eligibility. Acceptable List A documents are noted at 8 U.S.C. § 1324a(b)(1)(B) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A) (1996).

[10] List B documents establish identity only. Acceptable List B documents are noted at 8 U.S.C. § 1324a(b)(1)(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(B) (1996).

[11] List C documents establish employment eligibility only. Acceptable List C documents are noted at 8 U.S.C. § 1324a(b)(1)(C) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(C) (1996).

The respondent in that case, however, had verified that the employees in question were authorized to work in the United States by examining documents in Lists B and C. Id. Judge Schmidt hypothesizes:

> Without doubt, it would be irrational to hold that any omission on a Form I-9 in every circumstance is an unlawful failure to comply with the employment verification system within the meaning of 8 U.S.C. §1324a(a)(1)(B). For example, if these three employees had made the same omission in Section 1 but had provided their resident alien cards (as authorized by subparagraph (A)(i) and listed specifically in subparagraph (B) as a document satisfying IRCA's identity and employment eligibility requirements) to Respondent who, in turn, entered the ARN at the appropriate place on Section 2 of Form I-9, any effort to exact a civil money penalty because the same number was not redundantly entered in Section 1 would be such an egregious elevation of form over substance as to raise serious due process questions about IRCA's administration.

Id. at 3-4, 1991 WL 531865, at *3.

It is important to emphasize that the factual situation in PPJV did not involve the duplication of the same required number in section one and in section two. Judge Schmidt's quoted comments above merely reflect a hypothetical situation and are dicta. Even if the above quotation were a statement of law, the scenario Judge Schmidt describes is different from the situation in the present case. Judge Schmidt's hypothetical scenario contemplates that the inclusion of a document number in section two, thus indicating that the employer has examined that document, could render it unnecessary for the same number to be duplicated in section one where the I-9 form requests that particular information. In the present case, Respondent urges that the opposite is true; Respondent asserts that the inclusion of a requested number in section one avoids the obligation to include the same number in section two. Contrary to Respondent's assertion, the fact that an employee has written his or her social security number in section one does not indicate that the employer has examined the corresponding document for the purpose of determining the employee's employment authorization. Section one of the I-9 form demands that the employee's social security number be entered there, but it does not require that the social security card be presented. Only section two requires the presentation and verification of identity and employment authorization documents, of which a social security card is a permissible document, to establish employment authorization.

Judge Schmidt met the present set of facts more squarely in another case. For certain I-9 forms involved in that case, the respondent "denie[d] the allegations of improper completion on the ground that the necessary eligibility information, missing in part two of the I-9s, is present in part one of the form." United States v. Valladares, 2 OCAHO 316, 3 (1991), 1991 WL 531739, at *2 (Decision and Order Granting Complainant's Motion for Summary Decision). The opinion does not indicate exactly what type of document information was involved, but Judge Schmidt states generally that "[e]mployers have the duty to properly complete part two of the I-9s irrespective of whether the information sought in that part has already been set forth in the previous part of the form." Id., 1991

WL 531739, at *3. Noting the employer's attestation duty, Judge Schmidt concludes that "the presence of the employees' document identification numbers in part one of the I-9s cannot remedy Respondent's failure to attest to the fact that he has inspected the documents in part two of the forms." Id. at 4, 1991 WL 531739, at *3.

Respondent's argument also cannot stand because, in essence, it would mean that an employer could require employees to present a social security card for the purpose of determining work authorization. The INA prohibits an employer from demanding a specific document to establish identity and/or employment authorization. See 8 U.S.C. § 1324b(a)(6) (1994) (making it an unfair immigration-related employment practice to "refus[e] to honor documents tendered [for the purpose of establishing identity and/or employment authorization] that on their face reasonably appear to be genuine"); 8 C.F.R. § 274a.1(l)(1) (1996) ("Nothing in this definition should be interpreted as permitting an employer . . . to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual"). As Judge McGuire notes:

> The choice of documents which a job applicant . . . may present to a hiring person or entity in order to establish identity or work eligibility, or both, is exclusively that of the job applicant and not that of the hiring person or entity. At the risk of engaging in an unfair immigration-related employment practice, that of document abuse, the hiring person or entity may not refuse to accept documents which are facially valid nor may they insist . . . that a job applicant provide a specific document in order to establish employment eligibility.

United States v. Strano, 5 OCAHO 748, 17 (1995), 1995 WL 367114, at *13 (citing United States v. A.J. Bart, Inc., 3 OCAHO 538 (1993), 1993 WL 406027). For Respondent's argument, that the appearance of the social security number in section one means that the employer has examined the social security card for purposes of establishing work eligibility in section two, to hold true, that would mean that an employer would have to request the presentation of a particular document, the social security card, to establish employment authorization. As discussed immediately above, an employer may not do so without violating the document abuse provisions of the INA.

In light of the foregoing information, Complainant also is entitled to summary decision with respect to the remaining employees listed in Count IV, as follows: Ulrich Haller (¶ IV.A.6); Yvonne Heinrich (¶ IV.A.8); Anne Neishloss (¶ IV.A.14); Joanne Simone (¶ IV.A.18); Patricia Skrot (¶ IV.A.19); Dalia Soll (¶ IV.A.20); Sharon Toms (¶ IV.A.21); and Doreen Youkanavitch (¶ IV.A.25). Complainant's Motion, therefore, is granted with respect to Count IV.

F. Count V

In Count V, Complainant alleges that Respondent hired four employees and failed to ensure that they properly completed section one of the I-9 form and failed to properly complete section two. As noted above in the discussions regarding Counts III and IV, an employer must ensure that its employees properly complete section one of their respective I-9 forms, and an employer must

properly complete section two of its employees' I-9 forms. An examination of the I-9 forms that are the subject of Count V reveals the following:

| Paragraph of Count V and Name | Omissions in Sections One and Two |
|---|---|
| ¶A-1. Carol Amtmann | Section one: no indication that employee is a citizen or national of the United States, a lawful permanent resident, or an alien authorized to work;<br>Section two: no document reference in List A, and no document information; no document reference in List B, and no document information. |
| ¶A-2. Lucio Armenta | Section one: date of expiration of employment authorization included, but no alien number;<br>Section two: No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-3. Eliseo Garcia | Section one: no employee signature; date of expiration of employment authorization included, but no alien number;<br>Section two: No documents referenced in List A or in Lists B and C, and no document information. |
| ¶A-4. Mustafa Umas | Section one: no indication that employee is a citizen or national of the United States, a lawful permanent resident, or an alien authorized to work;<br>Section two: No documents referenced in List A or in Lists B and C, and no document information. |

Respondent does not cross-apply its argument in Count III, that omissions in section one of the I-9 form are not the employer's responsibility, to the portion of Count V that alleges failure to ensure proper completion of section one. That argument would have been equally unavailing here.

Respondent admits that the documentation portion of section two lacks an essential document reference and information for Carol Amtmann's I-9 form (¶ V.A.1). See R. Ans. C. Mot. Partial S.D. at 4; Kostis Dep. Tr. at 61. Complainant is entitled to summary decision with respect to the allegations regarding that I-9 form.

The documentation portions of section two of the remaining three I-9 forms that are the subject of Count V are completely blank. Respondent admits "that no documents were marked off on the I-9 form[s]" for those three individuals. R. Ans. C. Mot. Partial S.D. at 4; see also Kostis

Dep. Tr. at 61-63. Respondent, however, raises a substantial compliance defense[12] by asserting that "a photocopy of the actual documents, namely, the 'green card' and the social security card in each case, was attached to the I-9 form." R. Ans. C. Mot. Partial S.D. at 4. For the purposes of deciding the present Motion, Respondent's factual assertions must be considered true. Even assuming that Respondent attached photocopies of the above-noted documents to the three I-9 forms, Complainant still would be entitled to summary decision for those forms. Photocopying documentation and attaching it to the I-9 form, absent recording the applicable document identification numbers and expiration dates on the face of the I-9 form, does not set forth a substantial compliance defense sufficient to defeat a motion for summary decision. United States v. Corporate Loss Prevention Assocs., 6 OCAHO 908, at 6 (February 5, 1997) (Modification by the Chief Administrative Hearing Officer of Administrative Law Judge's Order). As a result, Complainant is entitled to summary decision with respect to the allegations regarding the remaining three I-9 forms in Count V.

G. Count VI

In Count VI, Complainant asserts that Respondent failed to complete the I-9 forms within three business days of the date of hire for twenty-one employees. An employer must complete section two of the I-9 form within three business days of the date of hire for each employee. See 8 U.S.C. § 1324a(a)(1)(B) (1994); 8 C.F.R. § 274a.2(b)(1)(ii) (1996). As the employee must complete section one of the I-9 form at the time of hire, see 8 C.F.R. § 274a.2(b)(1)(i)(A) (1996), the date of the employee's signature in section one generally indicates the date of hire. Complainant, however, contends that such date in section one does not accurately reflect the true date of hire for each of the twenty-one employees that are the subject of Count VI. In Exhibit H attached to its Motion and supporting memorandum, Complainant lists a different set of dates that it alleges are the true dates of hire for the named employees. A summary of information reveals the following:

| Paragraph of Count VI and Name | Date of employer signature in section two | Date of employee signature in section one | Date of hire as Complainant alleges in Ex. H to Mot. S.D. |
|---|---|---|---|
| ¶A.1. Thelma Butchko | 11-27-88 | 11-27-87 | 11-23-87 |
| ¶A.2. Tito Cambara | 5-16-94 | 5-16-94 | 5-7-94 |
| ¶A.3. Enrique Castro | 7-3-94 | 7-3-94 | 6-26-94 |
| ¶A.4. Susan DelPercio | 7-7-94 | 7-8-94 | 7-3-94 |

[12] Respondent raises the substantial compliance defense for the first time in its response to Complainant's Motion for Partial Summary Decision. Respondent does not assert that defense, or facts that would support it, in its Answer.

| | | | |
|---|---|---|---|
| ¶A.5. Susan English | 4-28-95 | 4-28-95 | 4-23-95 |
| ¶A.6. Stephanie Fairman | 2-17-90 | 2-17-90 | 2-12-90 |
| ¶A.7. Maynor Garcia | 6-27-93 | 6-27-93 | 6-20-93 |
| ¶A.8. Mary Goehrig | 1-28-90 | 1-28-90 | 1-21-90 |
| ¶A.9. Alan Jaffe | 3-27-93 | 3-27-93 | 3-21-93 |
| ¶A-10. Michael Kokkinos | 2-15-93 | 2-15-93 | 2-7-93 |
| ¶A-11. Catherine Mayer | 6-15-88 | 6-15-88 | 5-3-88 |
| ¶A-12. Tomas Milan | 5-15-92 | 5-15-92 | 5-10-92 |
| ¶A-13. F. Millan-Torres | 4-26-95 | 4-23-94 | 4-17-94 |
| ¶A-14. Cheryl Oestreich | 1-30-93 | 1-30-93 | 1-25-93 |
| ¶A-15. Carolyn Palmer | 5-22-93 | 5-22-93 | 5-16-93 |
| ¶A-16. Guadalupe Patricio | 4-23-94 | 4-23-94 | 4-17-94 |
| ¶A-17. L. A. Sanchez | 8-21-94 | 8-21-94 | 8-14-94 |
| ¶A-18. J. Sanford | 7-3-94 | 7-3-94 | 6-26-94 |
| ¶A-19. Petro Valerio | 3-7-92 | 3-7-92 | 3-2-92 |
| ¶A-20. Tina VanNorman | 3-24-95 | 3-23-95 or 8-23-95 | 3-18-95 |
| ¶A-21. Fernando Zacarias | 2-6-93 | 2-6-93 | 1-31-93 |

Exhibit H is an alphabetical list of employees, some of whose I-9 forms are the subject of the Complaint and some of whose forms are not charged in the Complaint; it purports to provide a summary of information for those employees, including date of hire, term of employment and omissions, if any, on their I-9 forms. During the prehearing conference of February 6, 1997, Mr. Frederick, Complainant's counsel, stated that then-INS Special Agent Patricia Pepe[13] prepared

[13] Ms. Pepe currently is a deportation officer for the INS. See Pepe Decl. ¶ 1.

Exhibit H with the assistance of Mr. Kostis and Respondent's accountant.[14] PHC Tr. at 8. Mr. Frederick stated that Ms. Pepe also relied on Respondent's payroll records to arrive at the alleged dates of hire in Exhibit H. Id. at 12-13.

Respondent challenges the authenticity of Exhibit H. R. Ans. C. Mot. Partial S.D. at 5. Respondent also disputes the dates of hire Complainant alleges in that exhibit. Id.; R. Suppl. ¶ 5. Respondent points out that the date in section one almost always coincides with the date of completion of section two of the I-9 form, as illustrated by the date of the employer's signature in section two. R. Ans. C. Mot. Partial S.D. at 5. Respondent contends that the date of employee signature on each I-9 form reflects the true date of hire for each employee.[15] Id. at 6; see also Kostis Dep. Tr. at 72.

Specifically, Respondent states the dates of hire Complainant alleges in Exhibit H are inaccurate because "the data contained on the 'hire-termination' listing was made by anumber [sic] of persons, not only one person, and not all employees or officers of the Respondent. Respondent believes that the reason several persons put their heads together to come up withthe [sic] data on the'hire-termination' [sic] document, was because the actual date of hire and termination could not be ascertained, and a certain amount of educated 'guess work' was involved." R. Ans. C. Mot. Partial S.D. at 5. Also, Mr. Kostis states that the dates of hire as listed in Exhibit H are the days the employees' names were entered on the payroll, which is not truly the date of hire. Kostis Dep. Tr. at 72-73. Mr. Kostis also states that he would hire an employee and then, always on the following Monday, he would place that employee on the payroll. Id. at 82-84, 90-92. The date of hire Complainant alleges in Exhibit H falls on Sunday for fourteen of the twenty-one employees listed in Count VI.[16] I have noted that there is no consistency regarding the days of the week represented by the dates in Exhibit H for the employees in Count VI. PHC Tr. at 21. At any rate, Mr. Kostis' testimony also would seem to indicate that the actual date of hire is even farther removed from the date of completion of section two than the date Complainant alleges is the date of hire in Exhibit H. During the prehearing conference held on February 6, 1997, Mr. Manos, Respondent's counsel, stated that Mr. Kostis had explained to him that the employee would complete section one of the I-9 form and that, the following Monday, the employee would be added to the payroll as of the date of

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[14] Complainant has submitted the accountant's name as Basil Lyssikatos, see C. Mot. Partial S.D. Ex. I at 1, but Respondent has noted the accountant's name as Vasilios Lyssikatos, see PHC Tr. at 8; Lyssikatos Decl. at 1.

[15] For each of the I-9 forms listed in Count VI, Complainant maintains that Mr. Kostis has admitted that the date in section two does not fall within three days of the date of hire as listed in Exhibit H. See C. Mem. Supp. Mot. Partial S.D. at 19-27. Even so, admitting that more than three days span between two given dates is not the same thing as admitting that one of those dates was the accurate date of hire, especially when Respondent specifically denies that Complainant's alleged dates of hire are accurate.

[16] There are four Monday dates, two Saturday dates and one Tuesday date.

the Monday prior to signing the I-9 form. Id. at 13-14. I noted the contradiction between that statement and Mr. Kostis' deposition testimony, id. at 15, but I also pointed out that the deposition transcript indicates Mr. Kostis has a limited understanding of English and that it is possible Mr. Kostis misunderstood the deposition question, id. at 16-17. In a subsequently submitted affidavit, Mr. Kostis confirms that "[d]ue to the fact that I do not read or speak English well, I could not clearly explain to Mr. Frederick or Mr. Manos in my deposition, what I have said above about the hire date."[17]

As previously noted, factual allegations must be viewed in the light most favorable to the non-moving party. Also noted previously, the moving party bears the initial burden of showing that there are no genuine issues of material fact. Complainant has not met that burden with respect to the forms in Count VI that, on their face, appear to have been completed within the given time limit. By my Order Directing Parties to Appear for a Telephone Prehearing Conference of February 3, 1997, I indicated that Complainant should be prepared to discuss how it arrived at the alleged dates of hire as listed in Exhibit H. To facilitate the discussion of that issue, Complainant submitted, prior to the conference, a Memorandum of Investigation prepared by Ms. Pepe and dated August 21, 1995.[18] During the conference, Mr. Frederick stated that Ms. Pepe prepared Exhibit H with the assistance of Mr. Kostis, Respondent's accountant, and Respondent's payroll records. PHC Tr. at 8, 12-13. I asked Mr. Frederick whether the actual payroll records were presented to the INS. Id. at 13. He replied that he did not know whether the same payroll records were provided. Id. As Complainant had not met its burden with respect to the forms that on their face appear to have been completed within the required time, I deferred ruling on Complainant's Motion with respect to those forms and allowed Complainant until February 18, 1997, to supplement its Motion, PHC Tr. at 60. After receiving Complainant's Supplement to the Motion for Summary Decision, I gave Respondent, by order of February 19, 1997, a similar opportunity to supplement its position with respect to the present Motion. Respondent filed its Answer Opposing Complainant's Supplement to the Motion for Summary Decision on March 7, 1997, and attached the sworn declarations of Mr. Kostis and Mr. Lyssikatos, Respondent's accountant, as exhibits.

Complainant's supplemental brief does not meet Complainant's burden. Attached to that brief Complainant submits the sworn declaration of Patricia Pepe, photocopies of the payroll records for the employees listed in Count VI, and photocopies of the I-9 forms for those employees. The dates on the payroll records listed under the column heading "Dates" match the alleged dates of hire in Exhibit H. The payroll records themselves, however, do not indicate the significance of the dates that Complainant professes are the dates of hire. The column headings under which those dates appear merely is labeled "Dates." The heading does not reveal what those dates signify.

Next, Ms. Pepe states that Mr. Lyssikatos told her that the column she was examining on the

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[17] Mr. Kostis' specific statements in his affidavit regarding the hire dates and how the dates on the payroll records were generated will be discussed later.

[18] Complainant previously submitted the first of that document's two pages as Exhibit I of the Motion for Partial Summary Decision.

payroll records contained the actual dates of hire for Respondent's employees. Pepe Decl. ¶ 8. Mr. Lyssikatos, however, counters that statement by asserting that, when Ms. Pepe asked him "to read off the 'hire date' from the payroll records," he complied, but that on no occasion did he "ever say, or imply, or intimate, that these were the actual hire dates." Lyssikatos Decl. ¶ 5. Mr. Lyssikatos states that he did not tell Ms. Pepe that the dates recorded on the payroll records were the actual hire dates for Respondent's employees because he did not know the actual hire dates for those employees. Id. ¶¶ 3-6. The directly conflicting testimony on this point makes it inappropriate for summary disposition.[19]

Ms. Pepe also states that a Department of Labor inspector who was present on an unrelated matter when she reviewed the payroll records on February 13, 1997, confirmed that the column she was examining "is the location where dates of hire are recorded on such forms." Pepe Decl. ¶ 7. Mr. Kostis parenthetically notes that Ms. Pepe's statement regarding the inspector's comments constitutes hearsay. Kostis Decl. ¶ 10. The OCAHO Rules of Practice provide that "[a]ny affidavits submitted with the motion [for summary decision] shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557." 28 C.F.R. § 68.38(b) (1996). Those sections comprise portions of the Federal Administrative Procedure Act (APA), which provides in pertinent part that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d) (1994) (emphases added). That provision does not mention the exclusion of hearsay evidence simply because it is so classified. In fact, "[i]t is well established . . . that hearsay evidence is admissible in administrative proceedings, if factors are present which assure the underlying reliability and probative value of the evidence." United States v. China Wok Restaurant, Inc., 4 OCAHO 608, at 11 (1994), 1994 WL 269371, at *8 (Decision and Order Granting in Part Complainant's Motion for Partial Summary Decision, Staying a Ruling on Count III, Directing Respondent to File Additional Evidence and Setting Date for an Evidentiary Hearing). Under the APA, "hearsay is 'admissible up to the point of relevancy.'" Evosevich v. Consolidation Coal Co., 789 F.2d 1021, 1025 (3d Cir. 1986) (quoting Richardson v. Perales, 402 U.S. 389, 410 (1971)).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. One could argue that the Department of Labor inspector's statement regarding the usual location of hire dates on payroll records in general makes it more likely that the noted column on these particular payroll records contains the employees' hire dates. It is unnecessary, however, to reach an ultimate conclusion at this time on the admissibility of that statement because the statement is of such little probative value that it would fail to meet Complainant's burden. The record is devoid of any information that this unnamed inspector has any

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[19] It is generally inappropriate to make credibility determinations on a motion for summary decision. United States v. Ortiz, 6 OCAHO 863, at 4 (1996), 1996 WL 455005, at *3 (Order Denying Complainant's Motion for Summary Decision); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); United States v. American Terrazzo, 6 OCAHO 828, at 5 (1995), 1995 WL 848945, at *4 (Prehearing Conference Report).

direct knowledge of the payroll record format that this particular payroll company uses. Also, the unidentified inspector's statement is too general in scope to supply the sole and conclusive link that the unlabeled dates on Respondent's payroll records are the dates on which the employees in question were hired.

Another independent reason also shows that Complainant has not met its burden with respect to Count VI. Ms. Pepe refers to two separate sets of payroll records. Pepe Decl. ¶ 7. Specifically, she states:

> On February 11, 1997, District Counsel, Kent Frederick, asked me to review the employee payroll records submitted by [Respondent] in response [to] the [INS'] First Request for Production of Documents. I reviewed the documents submitted to Mr. Frederick and determined that these documents were not the same records I reviewed when I conducted the audit in 1995. Therefore, arrangements were made to enable me to review the same documents presented to me in 1995.

Id. Ms. Pepe states that, on February 13, 1997, during a return visit to Respondent's diner, she reviewed the same payroll records that she had inspected during the I-9 audit on August 18, 1995. Id. ¶ 8. Ms. Pepe photocopied the payroll records for all the employees listed in Count VI, with the exception of employee Catherine Mayer (¶ VI.A.11), whose payroll records could not be found. Id. Ms. Pepe states that she believes the date of hire as listed in Exhibit H for Ms. Mayer, which Ms. Pepe recorded from payroll records in 1995, is accurate because all the other dates she recorded in 1995 match the dates on the payroll records that she recently reviewed for the second time.[20] Id. ¶ 9.

Ms. Pepe's acknowledgment of two sets of payroll records demonstrates the existence of a genuine issue of material fact, precluding summary judgment with respect to Count VI. Nowhere does Complainant explain how these two sets are different. Perhaps the sets cover different employees. Perhaps the sets cover the same employees, but reflect different dates in the column Complainant alleges contains the employees' hire dates. Perhaps those dates are the same in each, but other information is different. Complainant leaves the Court to guess why two separate sets of payroll records exist and how they are different from each other[21] and, therefore, cannot meet its burden of showing the absence of a material factual issue. The issue centering around the differences between the two sets of payroll records is material; if the difference is in the dates recorded on the payroll records, then that would cast doubt on the validity of the hire dates alleged in Exhibit H.

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[20] The alleged dates of hire in Exhibit H do correspond with the dates appearing in the column marked "Dates" on the payroll records submitted as Exhibits 2-21 of Complainant's supplement.

[21] The sets must be different from each other in some way(s), or Ms. Pepe would not have been able to detect that the payroll records she saw on February 11, 1997, were not the same records she inspected on August 18, 1995.

Respondent's supplemental response of March 7 also demonstrates the existence of genuine issues of material fact surrounding Count VI. Mr. Kostis asserts in his sworn declaration that the dates on the I-9 forms mark the true dates of hire for fifteen employees in Count VI that he personally hired and for whom he personally completed the I-9 forms. Kostis Decl. ¶ 4. Those individuals are as follows: Tito Cambara (¶ VI.A.2); Enrique Castro (¶ VI.A.3); Susan DelPercio (¶ VI.A.4); Maynor Garcia (¶ VI.A.7); Alen Jaffe (¶ VI.A.9); Michael Kokkinos (¶ VI.A.10);[22] Tomas Millan (¶ VI.A.12); Francisco Millan-Torres (¶ VI.A.13); Cheryl Oestreich (¶ VI.A.14);[23] Carolyn Palmer (¶ VI.A.15); Guadalupe Patricio (¶ VI.A.16); Luis Armenta Sanchez (¶ VI.A.17); Jacquelynn Sanford (¶ VI.A.18);[24] Petro Valerio (¶ VI.A.19); and Tina VanNorman (¶ VI.A.20).[25] Id.

Mr. Kostis states that he possesses no personal knowledge of whether the dates on the I-9 forms are the dates of hire for employees Thelma Butchko (¶ VI.A.1); Stephanie Fairman (¶ VI.A.6); Mary Goehrig (¶ VI.A.8); Catherine Mayer (¶ VI.A.11); and Fernando Zacarias (¶ VI.A.21) because he did not complete the I-9 forms for those employees.[26] Id. ¶¶ 5-6. He states, however, that he believes those I-9 forms were completed on the dates that those employees were hired. Id. Respondent provides no affidavits from the people who have personal knowledge of whether those I-9 forms were completed on the days that the above individuals were hired. Despite that failing, Respondent still demonstrates a genuine issue of material fact, with respect to four of those five I-9 forms[27] listed immediately above, by providing evidence that challenges the validity of Exhibit H. Of the ninety-one people listed in Exhibit H, Mr. Kostis notes twenty[28] who have termination dates listed by their names, but who really were not terminated at all, with the exception of one of those employees, who has an incorrect termination date listed for her. Id. ¶ 9. Mr. Kostis' sworn statement

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[22] Mr. Kokkinos' form actually is signed by someone other than Mr. Kostis.

[23] In addition to Mr. Kostis' signature in the employer certification section, this form bears the signature of his assistant, Nancy Sdregas.

[24] In addition to Mr. Kostis' signature in the employer certification section, this form bears the signature of his assistant, Nancy Sdregas.

[25] Mr. Kostis also signed the I-9 form for Susan English (¶ VI.A.5), but he does not include that employee on the list of employees whose I-9 forms he prepared. In fact, Mr. Kostis does not address Ms. English or her I-9 form at any point in his declaration.

[26] It would seem that Mr. Kostis also has no direct knowledge regarding the I-9 form for Michael Kokkinos (¶ VI.A.10). See supra n.22 and accompanying text.

[27] No genuine issue of material fact exists with respect to Thelma Butchko's I-9 form, to be discussed in more detail infra.

[28] I-9 forms for three of those employees (Thelma Butchko, Susan DelPercio and Michael Kokkinos) are subjects of Count VI. The I-9 forms for the remaining seventeen either are listed in other counts of the Complaint or are not subjects of the Complaint at all.

that Exhibit H contains certain inaccurate factual information creates a genuine issue of material fact regarding whether Exhibit H contains other factual inaccuracies.[29]

It should be noted that Mr. Kostis' statement does not challenge directly the validity of the underlying documents, i.e., the payroll records, that were the source for the alleged dates of hire in Exhibit H. The payroll records (attached as Exhibits 2-21 of Complainant's Supplement to the Motion for Summary Decision) that are part of the case record[30] for the employees noted by Mr. Kostis all are dated[31] prior to the dates Complainant alleges in Exhibit H are those employees' termination dates. As a result, it does not seem that those particular payroll records could have been the source of the alleged termination dates.[32] Mr. Kostis' statement could be interpreted as merely challenging the validity of the source Complainant used to arrive at the listed termination dates. As noted previously, I am required to make all reasonable inferences in Respondent's favor. It is reasonable to infer that Mr. Kostis' statement contests more than just the validity of the particular source of the listed termination dates. It is reasonable to infer a broader challenge: i.e., that Mr. Kostis' statement disputes Complainant's process and method of gathering information.

Also, Mr. Kostis describes how the dates on the payroll records were generated. Mr. Kostis

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[29] Other information from the current case record supports Mr. Kostis' statement. Three employees that Mr. Kostis does not mention who are listed in Count VI have termination dates listed in Exhibit H that fall prior to the dates of the payroll records that Complainant has submitted for them. Exhibit H lists a termination date of August 18, 1994, for Tomas Milan (¶ VI.A.12) and Petro Valerio (¶ VI.A.19), but both those employees remained on the payroll with a payroll period ending date of December 10, 1994. See C. Suppl. Mot. S.D. Exs. 12, 19. Exhibit H shows a termination date of June 18, 1995, for Tina VanNorman (¶ VI.A.20), but that employee remained on the payroll with a payroll period ending date of July 1, 1995. See id. Ex. 20.

[30] The current case file contains payroll records for only eleven of the twenty employees Mr. Kostis specifies. See C. Suppl. Mot. S.D. Exs. 2 (Thelma Butchko), 5 (Susan DelPercio), 8 (Vanessa Heath), 11 (Michael Kokkinos, Andreas Kostis and Athanasios Kostis), 12 (Susan Munroe and Scott Minter), 15 (Ella Polonski), 19 (Emmanuel Topakas), 20 (Sandra Williamson). Complainant has presented payroll records for employees listed in Count VI. Only three Count VI employees are among the twenty employees noted by Mr. Kostis. Records for the other eight employees are available in the case file because their names happen to appear on pages of the payroll that Complainant has submitted for employees listed in Count VI.

[31] As indicated by pay period and pay dates included at the top of each payroll page.

[32] It is curious to note, however, that Ms. Pepe states that she derived the "date[s] of hire and termination based on the payroll records which Mr. Lyssikatos provided" at the August 18, 1995, audit, Pepe Decl. ¶ 4 (emphasis added), which were the same payroll records she reviewed and photocopied on February 13, 1997, id. ¶ 8.

states that he would speak with a representative of the company that handled Respondent's payroll each week, usually on Mondays, to update the payroll. Kostis Decl. ¶ 8. Mr. Kostis states that, when the payroll company representative would inquire about when new hires started working:

> I would answer "When did the week start?" Meaning, use the date on which the pay week started. The ADP[33] employee would then insert the date on which the pay week started. I did not know that there was any special importance to what date ADP used, because the employee was only paid for the hours he or she worked, regardless of what date we would put down for his starting date.

Id. Mr. Kostis reiterates that "[t]he starting date that I gave to ADP had to be a date before, not after, the actual start date, since the hours worked were not yet known." Id. ¶ 13.

In a related argument, Mr. Kostis states that most of Complainant's alleged dates of hire fall on Saturdays or Sundays and that he "know[s] we did not hire the whole of our employee force on Saturdays and Sundays, which are our busiest days." Id. ¶ 11. Specifically, Mr. Kostis states that "out of the 94 individuals, there are only 4 Mondays, one Wednesday, and one Tueday [sic]." Id.

Mr. Kostis' information is slightly inaccurate. Ninety-one employees, not ninety-four, are listed in Exhibit H. Of the alleged dates of hire for those ninety-one people, nine fall on Monday, six on Tuesday, one on Wednesday, two on Thursday and two on Friday. The remaining seventy-one employees have alleged hire dates that fall on either Saturday or Sunday. Even so, approximately 77.9 percent of the employees listed in Exhibit H are listed as being hired on Saturday or Sunday. Mr. Kostis' point is valid despite the inaccurate totals he provides in his statement. This evidence also bolsters Mr. Kostis's claim that the dates in Exhibit H reflect beginning pay period dates rather than dates of actual hire.

Complainant has not met its burden of showing no genuine factual issues with respect to the I-9 forms that, on their face, appear to have been completed within the three day time limit. All the above information reveals disputed issues of material fact for which live testimony and the opportunity for cross examination would help elucidate matters. As a result, I deny Complainant's Motion for Partial Summary Decision as it relates to Count VI, with two exceptions to follow.

A comparison of the dates in sections one and two of the above I-9 forms indicates, if the dates in section one are the correct dates of hire, that Respondent would have completed the I-9 forms within the three business days time requirement, with the exception of two forms. Thelma Butchko's I-9 form (¶ VI.A.1) indicates that exactly one year passed between the date that the employee signed the form and the date that the employer representative signed the form. Respondent states that the employer representative who completed this form accidentally noted the date as "11-27-88" when the year was 1987. R. Ans. C. Mot. Partial S.D. at 6. The I-9 form for Francisco Millan-Torres (¶ VI.A.13) indicates a lapse of one year and three days between the date that the employee completed section one of the form and the date that the employer completed section two.

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[33] ADP is the business that prepares Respondent's payroll.

Respondent asserts that the employer representative who completed section two of that form mistakenly listed the year as 1995 when, in reality, it was 1994. Id. Assuming that section one reflects the true date of hire and that Respondent erred in noting the years for the two previously mentioned forms, then Respondent would be in compliance with the law that requires employers to complete the I-9 form within three business days of hiring an employee.

However, since there is no dispute as to the genuineness of those documents, and since Respondent argues with respect to the other I-9 forms that the date of hire should be presumed to be the date in section one of the I-9 form, Complainant has met its initial burden by submitting those two I-9 forms. As noted previously, after the moving party has met its initial burden of proof, the opposing party must come forward with specific facts showing that there is a genuine issue for trial. Respondent may not defeat the Motion simply by arguing that the dates in those two particular forms must be a mistake. Respondent has the burden to come forward with some evidence (such as an affidavit or other extrinsic evidence) that shows the true dates of hire. It may not simply rely on conjecture or speculation. Respondent did not provide any such evidence with its initial response to Complainant's Motion or in its supplemental response of March 7, which attached the declaration of Mr. Kostis as an exhibit. Mr. Kostis makes no mention in his sworn declaration of the possibility, raised in Respondent's initial response to Complainant's Motion, that an error occurred in recording the dates on these two forms. In fact, Mr. Kostis specifically places Francisco Millan-Torres in a list of employees that he says were hired on the date that appears on the I-9 form. Kostis Decl. ¶ 4. With respect to Thelma Butchko, Mr. Kostis merely states that his brother hired her and that he believes his brother completed and signed her I-9 form on the date she was hired. Id. ¶ 5. Consequently, Respondent does not raise a genuine issue of fact with respect to the two I-9 forms in Count VI that, on their face, do not appear to have been completed within the requisite time. I grant Complainant's Motion for Partial Summary Decision as it relates to those two I-9 forms.

## IV. CONCLUSION

Complainant does not seek summary decision for Count I or the issue of penalty. As there are no genuine issues of material fact and Complainant is entitled to judgment as a matter of law with respect to Count II's alternative allegation of failure to present I-9 forms and with respect to all of Counts III, IV and V, I grant Complainant's Motion for Partial Summary Decision for those counts. I also grant Complainant's Motion as it relates to the I-9 forms for Thelma Butchko (¶ VI.A.1) and Francisco Millan-Torres (¶ VI.A.13) in Count VI. I deny Complainant's Motion as it relates to all other aspects of Count VI.

**ROBERT L. BARTON, JR.**
**ADMINISTRATIVE LAW JUDGE**

## CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 1997, I have served the foregoing Order Granting in Part Complainant's Motion for Summary Decision to the following persons, by first class mail, (unless otherwise indicated) at the addresses shown:

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